APPEAL NO. 021120
FILED JUNE 26, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). Following a contested case hearing held on April 8, 2002, the hearing officer determined that the respondent (claimant) had disability from _____, through the date of the hearing. The appellant (carrier) has filed an appeal of this determination on evidentiary sufficiency grounds. The carrier also asserts error in the denial of its motion to add another disputed issue. The claimant's response contends that the evidence is sufficient to support an affirmance.

DECISION

Affirmed in part; reversed and rendered in part.

The parties stipulated that on _____, the claimant sustained a compensable injury. The claimant testified that a metal fitting fell on the back of his right ankle and injured his Achilles tendon; that he finished his shift; that on _____, he was seen by a doctor at (clinic) and returned to modified duty with restrictions; that he performed office work but had to walk extensively and the pain and swelling from his injury were not improving; and that he changed treating doctors to Dr. C, whose chiropractic treatment commenced on December 10, 2001. The claimant further stated that he began losing time from his employment on December 13, 2001. This is consistent with the position of the parties on this issue at the benefit review conference (BRC), as reflected in the BRC Report dated February 26, 2002.

The employer's Supplemental Report of Injury (TWCC-6) in evidence reflects that the claimant returned to modified duty at full pay on _____. One of Dr. C's records reflects that the claimant told Dr. C that he was fired on December 13, 2001, because he changed treating doctors to Dr. C and because the employer felt that, based on a surveillance tape showing the claimant walking without crutches after having had crutches prescribed by Dr. C, the claimant and Dr. C were committing insurance fraud. Both the claimant and Dr. C testified that the claimant was not required to use the crutches whenever walking and that he had been given both a walking cast and a boot to allow him to have some weight bearing on his injured right foot.

The claimant introduced an Employer's First Report of injury or Illness (TWCC-1) dated November 7, 2001, which states in Block 17, "No lost time"; copies of a handwritten and a typewritten TWCC-6 reflecting dates of November 12, 2001, and December 14, 2001, respectfully, and further reflecting in Block 6 that the claimant returned to work on _____, on "limited duty: full pay"; and an Employer's Wage Statement (TWCC-3) signed by the employer's payroll clerk on November 28, 2001, which, in response to the question in block 9, "Has employee returned to work," has checked the answer, "Yes." The claimant also introduced a Payment of

Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated December 14, 2001, which states as follows: "The carrier disputes the disability on this claim as the claimant was working sedentary work for the insured since the date of injury making the same wages as before the injury. There has been no new findings or diagnosis showing any new disability." The claimant also introduced a TWCC-6 dated December 28, 2001, stating that the date of termination of the claimant's employment was December 19, 2001. Both parties introduced Work Status Report (TWCC-73) forms completed by Dr. C allowing the claimant to return to work with specified restrictions as of November 1 through December 13, 2001, and Dr. C's TWCC-73 dated December 13, 2001, stating that the claimant is restricted from all work as of that date and needs to ambulate with crutches pending an orthopedic consult.

The focus of the hearing officer's discussion of the evidence and, indeed, the carrier's request for review, is on the claimant's credibility vis-à-vis the surveillance videotape depicting the claimant walking without crutches and the hearing officer resolved this issue in the claimant's favor. We are satisfied, despite the different inferences that could be drawn from the evidence, that this factual resolution by the hearing officer is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W. 2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W. 2d 660 (1951). However, based on the great weight of the evidence, we reverse the hearing officer's determination to find and conclude that the claimant's period of disability began on _____, and render a new decision that the claimant's period of disability began on December 13, 2001.

The carrier also urges error in the hearing officer's denial of an oral motion made at the hearing, and opposed by the claimant, to add an additional disputed issue concerning whether the employer had made a bona fide offer of employment to the claimant. *See* Section 408.103(e) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6 (Rule 129.6). Section 410.151(b)(2) provides, in part, that an issue not raised at a BRC may not be considered unless the Texas Workers' Compensation Commission (Commission) determines that good cause existed for not raising the issue at the conference. Rule 142.7 provides for the addition of issues to the statement of disputes by written response to the BRC report, by unanimous consent, and by a finding of good cause by the hearing officer. While the hearing officer summarily denied the motion stating, "OK, I'm not going to add the issue, I only do what the BRO [benefit review officer] gives me," we will, under the particular circumstances of this case, infer that the hearing officer did not find good cause in that the carrier failed to demonstrate its compliance with Rule 142.7(e) requiring that such request for the additional issue be in writing and submitted to the Commission no later than 15 days before the hearing. We find no abuse of discretion in this ruling. Morrow v. H.E.B., Inc., 714 S.W. 2d 297 (Tex. 1986). However, we continue to caution that express findings of good cause or the lack of good cause should be made by hearing officers on the record.

We affirm the decision of the hearing officer that the claimant had disability through the date of the hearing. We reverse the determination that the claimant's

disability began on _____, and render a new decision that the disability began on December 13, 2001.

The true corporate name of the insurance carrier is **ST. PAUL FIRE & MARINE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

MIKE MARINO
225 EAST JOHN CARPENTER FREEWAY, SUITE 1100
IRVING, TEXAS 75062.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Susan M. Kelley
Appeals Judge